

SUPER LAW GROUP, LLC

April 26, 2016

Via Certified Mail, Return Receipt Requested

MV Transportation of California
MV Transportation Inc.
R. Carter Pate & Brian Kibby
5910 N. Central Expressway
Suite 1145
Dallas, TX 75206

Reliant Transportation, Inc.
Brian Kibby
5910 N. Central Expressway
Suite 1145
Dallas, TX 75206

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear Mr. Kibby and Mr. Pate:

We are writing on behalf of Riverkeeper, Inc.¹ ("Riverkeeper"), and Raritan Baykeeper Inc. (d/b/a NY/NJ Baykeeper)² ("Baykeeper"), to notify you of Riverkeeper and Baykeeper's (collectively the "Waterkeepers") intent to file suit against MV Transportation, Inc., MV Transportation of California, and Reliant Transportation, Inc. (together, "MV Transportation"), pursuant to Section 505(a) of the federal Clean Water Act ("CWA")³ for violations of the CWA.

The Waterkeepers intend to file suit, as an organization and on behalf of its adversely affected members, in the United States District Court for the Eastern District of New York seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this letter.⁴

¹ Riverkeeper, Inc. is a not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Ossining, New York. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the Hudson River and its ecosystem, as well as the watersheds that provide New York City with its drinking water. Riverkeeper achieves its mission through public education, advocacy for sound public policies and participation in legal and administrative forums. Riverkeeper has more than 4,500 members, many of whom reside near to, use and enjoy the Hudson River and the waters and tributaries of New York Harbor, including Newtown Creek, Coney Island Creek, Jamaica Bay, and the Gowanus Canal; waters that are polluted by industrial stormwater runoff.

² Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper), is a non-profit public interest 501(c)(3) corporation, whose mission is to protect, preserve, and restore the ecological integrity and productivity of the Hudson-Raritan Estuary through enforcement, field work and community action. Baykeeper has approximately 225 members in the New York and New Jersey region, many of whom use and enjoy New York Harbor, which is polluted by industrial stormwater runoff discharged by facilities in New York City that are or should be covered by the General Permit and New Jersey that must comply with New Jersey's Basic Industrial Stormwater General Permit.

³ 33 U.S.C. § 1365(a). We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

⁴ See 40 C.F.R. § 135.2(a)(3)(c) (notice of intent to file suit is deemed to have been served on the postmark date).

The Waterkeepers intends to take legal action because MV Transportation is discharging polluted stormwater to the waters of the United States without a permit, at two MV Transportation facilities: one located near Newtown Creek in Brooklyn (the “Brooklyn Facility”) and another located near the Kill Van Kull in Staten Island (the “Staten Island Facility”) (collectively the “Facilities”). These discharges violate Sections 301(a) and 402(p)(2)(B) of the Clean Water Act.⁵ Further, MV Transportation has not applied for coverage under, nor complied with the conditions of, an individual National Pollutant Discharge Elimination System (“NPDES”) permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity (“General Permit”)⁶ issued by the New York State Department of Environmental Conservation (“DEC”), in violation of Sections 402(p), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

The street address of the Brooklyn Facility is provided in government records as 297 Norman Avenue, Brooklyn, NY. For clarity, the Facility location can be uniquely identified by tax block and lot number as block 2612 lot 133 in Kings County. The waters of the United States that are polluted by the Brooklyn Facility are Newtown Creek and the East River.

The street address of the Staten Facility is provided in government records as 1957 Richmond Terrace, Staten Island NY. The Facility location can be uniquely identified by tax block and lot number as block 185 lot 527 in Richmond County. The waters of the United States that are polluted by the Staten Island Facility are the Kill Van Kull and New York Harbor.

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into New York Harbor. The consensus among agencies and water quality specialists is that stormwater pollution accounts for more than half of the total pollution entering the marine environment each year.⁷

DEC has designated more than 7,000 river miles, 319,000 acres of larger waterbodies, 940 square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in the State as “impaired,” or not meeting water quality standards, and unable to support beneficial uses such as

⁵ 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

⁶ New York State Department of Environmental Conservation, *SPDES Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity*, Permit No. GP-0-12-001, (hereinafter “General Permit”), available at <http://www.dec.ny.gov/chemical/9009.html>. This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on October 1, 2012, and will expire on September 30, 2017.

⁷ Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. See 40 C.F.R. § 122.26(b)(13).

fish habitat and water contact recreation.⁸ For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

A. The Brooklyn Facility and Newtown Creek.

Stormwater discharges flow from the Facility through a separate storm sewer system into Newtown Creek and ultimately into the East River and New York Harbor. DEC has classified Newtown Creek as an SD water.⁹ Under New York's Water Quality Standards, a waterbody that is designated as SD is meant to be suitable for fishing and for fish, shellfish and wildlife survival.¹⁰ The New York Water Quality Standards also set numeric and narrative criteria for different water pollution parameters including dissolved oxygen, oil and grease, suspended and settleable solids, bacteria (pathogens), pH, temperature, nutrients, and others. A waterbody must meet these numeric and narrative criteria in order to support its designated uses.¹¹

Newtown Creek, a Superfund site, consistently fails to meet state water quality standards; illegal stormwater discharges from this Facility contribute to this failure.¹² In the past, DEC has designated Newtown Creek as impaired pursuant to Section 303(d) of the CWA¹³ for failure to meet minimum water quality standards due to high oxygen demand (low levels of dissolved oxygen) and the presence of floatables (oil, grease, and other debris) attributable in part to urban stormwater runoff.¹⁴ While the Creek has been removed from the list of waterbodies for which a Total Maximum Daily Load ("TMDL") must be developed, the degraded water quality conditions that led to the impaired listing have not been addressed; polluted discharges to Newtown Creek continue to reduce the dissolved oxygen level in the Creek.¹⁵ Illegal stormwater discharges from this Facility carry oxygen demanding chemicals into Newtown Creek and therefore contribute directly to this problem.

For years, Newtown Creek was treated as an industrial dumping ground; businesses along its banks polluted with abandon. In recent decades, New York City has worked to reclaim the quality of New York Harbor and of Newtown Creek. The City and local residents have invested heavily in efforts to rejuvenate the Creek and surrounding neighborhoods. Recently, the U.S.

⁸ See EPA, Watershed Assessment, Tracking and Environmental Results, New York Assessment Data for 2012, http://ofmpub.epa.gov/waters10/attains_state.report_control?p_state=NY&p_cycle=2012&p_report_type=A (last visited August 27, 2015).

⁹ See 6 N.Y.C.R.R. § 890.6.

¹⁰ See 6 N.Y.C.R.R. § 701.14.

¹¹ See 6 N.Y.C.R.R. §§ 702, 703.

¹² See NY DEC, *Impaired/DeListed Waters NOT Included on the 2014 Section 303(d) List Sept. 2014*, available at http://www.dec.ny.gov/docs/water_pdf/303dlistfinal2014.pdf (hereinafter "303(d) List").

¹³ 33 U.S.C. § 1313(d).

¹⁴ See 303(d) List.

¹⁵ See *Id.*

EPA joined the effort by designating Newtown Creek as a Superfund site, setting aside funds for a cleanup, and mobilizing public and private efforts to restore the Creek to a healthier state.¹⁶

B. The Staten Island Facility and the Kill Van Kull

Stormwater discharges flow from the Staten Island Facility down-slope to a short, narrow inlet that empties directly into the Kill Van Kull. The Kill Van Kull is located between Staten Island and Bayonne, NJ and connects Newark Bay to the Upper New York Bay, which is fed by the Hudson and East Rivers and connects to the Lower New York Bay and the Atlantic Ocean. Like Newtown Creek, DEC has classified the Kill Van Kull as an SD water.¹⁷

The Kill Van Kull consistently fails to meet state water quality standards and illegal stormwater discharges from this Facility contribute to this failure.¹⁸ DEC has designated the Kill Van Kull as impaired pursuant to Section 303(d) of the CWA¹⁹ for failure to meet minimum water quality standards for a number of pollutants, including floatables, PCBs, dioxin, and other toxics.²⁰ DEC also indicates that “Urban Stormwater Runoff,” which includes illegal stormwater discharges from facilities such as the Staten Island Facility, contributes significantly to the Kill Van Kull’s impaired status.²¹

While the Kill Van Kull is one of the most heavily traveled waterways on the east coast, its water quality should not be sacrificed to polluters. Various levels of the government are making significant efforts to improve the Kill Van Kull’s water quality. For instance, in 2010, the New York City Department of Environmental Protection activated a new throttling gate at Staten Island’s Port Richmond Wastewater Treatment Plant allowing excess stormwater and sewage to be stored in existing sewer lines rather than discharging directly into the Kill Van Kull.²² And the States of New York and New Jersey have been working together with U.S. Environmental Protection Agency (“EPA”) for some time on plans to restore water quality throughout the New York Harbor under the Clean Water Act.

* * *

In short, it is time for MV Transportation to join fully in the effort to restore the biological integrity of Newtown Creek and the Kill Van Kull. At a minimum, MV Transportation must stop illegally discharging polluted stormwater and other effluents into these waterbodies.

¹⁶ See 40 C.F.R. Part 300, App. B.

¹⁷ See 6 N.Y.C.R.R. § 890.

¹⁸ See NY DEC, 33 U.S.C. § 1313(d), *Proposed Final 2014 New York State Section 303(d) List* (September 2014), available at <http://www.dec.ny.gov/chemical/31290.html> (“303(d) List”).

¹⁹ 303(d) List.

²⁰ 303(d) List at 9, 25, and fn 68.

²¹ 303(d) List at 9.

²² Press Release, NYC Department of Environmental Protection, DEP Completes Project to Improve Water Quality in Kill Van Kull (May 19, 2010), available at http://www.nyc.gov/html/dep/html/press_releases/10-51pr.shtml#.VYHVZIVViko.

II.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. MV Transportation is Discharging Stormwater Associated with Industrial Activity to Waters of the United States without a Permit.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.²³ MV Transportation's industrial activity at the Facilities has caused and continues to cause a "discharge of pollutants" within the meaning of Section 502(12) of the CWA²⁴ and a "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14) from the Facilities on each and every day that there has been a rain event of more than 0.1 inches.²⁵ The Facilities have exposed and continue to expose industrial pollutants to stormwater, at a minimum, (a) maintaining buses and other vehicles onsite and storing such vehicles outside or otherwise exposing them to the elements, and (b) from vehicles entering and leaving the Facilities that track pollutants off site. During precipitation events (including runoff from rainfall and snow or ice melt events), pollutants enter storm drains at the Brooklyn Facility and discharge into Newtown Creek, and run off, or are drained, from the Staten Island Facility directly into a narrow inlet or tributary of the Kill Van Kull.

MV Transportation's activities at the Brooklyn and Staten Island Facilities include but are not limited to the fueling, maintenance and storage of passenger buses. Riverkeeper has observed vehicles awaiting repairs, under repair, maintenance equipment, and dumpsters stored uncovered and exposed to precipitation. These activities include operation and storage of industrial equipment and much of this activity is conducted outdoors. In carrying out these activities, MV Transportation stores and handles materials in a manner that exposes pollutants to precipitation and snowmelt. The stormwater discharged into Newtown Creek and the Kill van Kull can carry solids that suspend or dissolve in stormwater, heavy metals, hydraulic fluids, hydrocarbons, and other pollutants.²⁶

The entire Brooklyn Facility is paved, and includes a number of storm drains. Riverkeeper believes that the storm drains at the Brooklyn Facility empty into a separate sewer system that discharges into Newtown Creek. The Staten Island Facility is mostly paved and is serviced by

²³ See CWA §§ 301(a) and 402.

²⁴ 33 U.S.C. § 1362(12).

²⁵ EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity. See, e.g., 40 C.F.R. § 122.26(c)(i)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

²⁶ See EPA, "Industrial Stormwater Fact Sheet Series, Sector P: Motor Freight Transportation Facilities, Passenger Transportation Facilities, Petroleum Bulk Oil Stations and Terminals, Rail Transportation Facilities, and United States Postal Service Transportation Facilities." *available at* http://water.epa.gov/polwaste/npdes/stormwater/upload/sector_p_transportationfacilities.pdf.

some storm drains, but also sits directly on the bank of a small inlet connected by only a short distance to the Kill Van Kull. The site is graded such that it slopes down toward the inlet. The stormwater discharged at both facilities is associated with industrial activity and contains debris, suspended solids, and other pollutants.

Buses, trucks and other vehicles driving on and off the property are also point sources of pollution. Vehicles and industrial equipment at both facilities may expose many other pollutants to the elements, including gasoline, diesel fuel, anti-freeze, and hydraulic fluids.

All of these pollution sources are exposed to precipitation and snowmelt. These pollution sources also may release fuel, oil, lubricants, PCBs, PAHs, an array of metals, pH-affecting substances and chemical residues. These toxic pollutants are often generated in the form of small particulate matter, which settles on the ground and other surfaces that are exposed to stormwater and non-stormwater flows.

Because MV Transportation fails to adequately shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Polluted stormwater discharges flow into storm drains on the Brooklyn Facility and into Newtown Creek, and into storm drains and overland from the Staten Island Facility into the Kill van Kull. Further, vehicles at both facilities track dust, particulate matter, and other contaminants to areas on and off the premises from which these pollutants can enter stormwater and, ultimately, the New York Harbor.

Both Newtown Creek and the Kill van Kull are “waters of the United States,” as defined in 40 C.F.R. § 122.2 and, therefore, “navigable waters” as defined in Section 502(7) of the CWA. MV Transportation does not have a NPDES permit for these discharges of pollutants. Thus, MV Transportation is discharging polluted industrial stormwater into navigable waters of the United States without the permit required under Sections 301 and 402 of the CWA.

B. MV Transportation is Violating the Clean Water Act by Failing to Apply for NPDES Permit Coverage.

At both Facilities, MV Transportation maintains a fleet of passenger buses. Accordingly, MV Transportation is an industrial discharger engaged in passenger transportation under Standard Industrial Classification (“SIC”) Group 41, which is an industrial activity included in Sector P of the General Permit.

To be eligible to discharge under the General Permit, MV Transportation must submit to DEC a registration form called a “Notice of Intent.”²⁷ Notice of Intent forms are available online from

²⁷ See General Permit, Part I.E.3. In notifying MV Transportation that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, the Waterkeepers do not concede that all of the activities conducted at the Facilities are necessarily eligible for coverage under that permit. For example, if a

DEC.²⁸ To register, MV Transportation is required, among other things, to list all stormwater discharges, including descriptions of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the separate storm sewer system or immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about whether the receiving waters are impaired.²⁹ MV Transportation has failed to prepare and file a Notice of Intent or an application for an individual permit.³⁰

C. MV Transportation is Violating the Clean Water Act by Failing to Comply with the General Permit.

As a discharger of stormwater associated with industrial activity, MV Transportation must comply at all times with the requirements of the General Permit (or an individual permit).³¹ By discharging stormwater associated with industrial activity at both Facilities, without complying with the General Permit, MV Transportation is violating CWA Sections 301(a) and 402(a) and (p).³² The main General Permit requirements that MV Transportation has failed and continues to fail to meet are explained further below.

1. MV Transportation has not developed and implemented a Stormwater Pollution Prevention Plan at Either Facility.

Before submitting a registration form, MV Transportation must prepare, make available, and implement a Stormwater Pollution Prevention Plan ("SWPPP") in accordance with schedules established in the General Permit.³³ The SWPPP must identify potential sources of pollution that may affect the quality of stormwater discharges associated with industrial activity. Further, the SWPPP must describe and ensure the implementation of practices that minimize the discharge of pollutants in these discharges and that assure compliance with the other terms and conditions of the General Permit, including achievement of effluent limitations.³⁴

Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C of the permit.

²⁸ See http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²⁹ See Division of Water, NY DEC, *Notice of Intent For Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP)* (2012), available at http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

³⁰ A thorough search of EPA's Enforcement & Compliance History Online ("ECHO") database and DEC's records reveals that no Notice of Intent has been submitted for the Facility.

³¹ This section discusses the compliance requirements of the General Permit. If MV Transportation elects to seek coverage under individual NPDES permits instead, the conditions of those individual permits will be at least as strict as those of the General Permit, thus MV Transportation will still be required to comply with all of the following.

³² Sections 301(a) and 402(a) and (p) make it unlawful for MV Transportation to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

³³ See General Permit Part III.B.

³⁴ See General Permit Part III.A.

Among other things, the SWPPP must include: a general site description, a general location map identifying the location of the facility and all receiving waters to which stormwater discharges, information related to a company stormwater pollution prevention team, a summary of potential pollutant sources, a description of control measures and best management practices, and schedules and procedures for implementation of control measures, monitoring and inspections.³⁵

MV Transportation has not developed and implemented a legally compliant SWPPP at either Facility, as required by Part III of the General Permit.³⁶

2. MV Transportation has not implemented control measures and Best Management Practices that are selected to meet best available technology standards.

MV Transportation cannot legally discharge stormwater under the General Permit at either Facility until MV Transportation implements mandatory general and sector-specific control measures called Best Management Practices (“BMPs”) in order to minimize the discharge of pollutants from the Facility.³⁷ The selected measures must reduce the discharge of pollution from each Facility to the extent practicable through use of the best available technology for the industry.

The General Permit requires that “[t]he owner or operator must select, design, install, and implement control measures (including best management practices),” in accordance with good engineering practices, to meet the effluent limits contained in the permit.³⁸ The General Permit’s effluent limits include both numeric limits specific to certain sectors³⁹ and non-numeric technology-based effluent limits that apply to all facilities.⁴⁰ These non-numeric technology-based restrictions include minimizing the exposure of pollutants to stormwater⁴¹ and minimizing the discharge of pollutants in stormwater⁴² “to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”⁴³

MV Transportation has not minimized the discharge of pollution to the extent achievable by implementing control measures or BMPs that are technologically achievable and economically

³⁵ See General Permit Part III.C.

³⁶ The Waterkeepers believe no SWPPPs exist. If a SWPPP exists at either Facility, then it is either facially inadequate or has not been fully and adequately implemented.

³⁷ See General Permit Part I.B.1, *see also* Part VII (setting forth sector-specific control measures and practices).

³⁸ General Permit Part I.B.1.a. *See also* Part III.C.7 (“The SWPPP must document the location and type of BMPs installed and implemented at the facility to achieve the non-numeric effluent limits in Part I.B.1.a.(2) and where applicable in Part VIII, and the sector specific numeric effluent limitations in Part VIII.”).

³⁹ See General Permit, Part VIII.

⁴⁰ See General Permit, Part I.B.1.a.2.

⁴¹ See General Permit, Part I.B.1.a.2.a.

⁴² See General Permit, Part I.B.1.a.2.f.

⁴³ See General Permit, Part I.B.1 (“In the technology-based limits included below and in Part VIII, the term ‘minimize’ means reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”).

practicable and achievable in light of best industry practice, as required by Parts I.B.1 and VIII of the General Permit.

3. MV Transportation has not at either Facility conducted routine site inspections or complied with monitoring, recordkeeping, and reporting requirements.

MV Transportation must conduct an annual comprehensive site inspection and evaluation at both Facilities of areas where industrial materials or activities are exposed to precipitation or where spills and leaks have occurred within the past three years.⁴⁴ The inspection must ensure that all stormwater discharges are adequately controlled and that all BMPs are functioning as expected.⁴⁵ Records of this inspection must be kept for five years.⁴⁶

In addition, qualified facility personnel must carry out routine inspections at least quarterly.⁴⁷ During these inspections, personnel must evaluate conditions and maintenance needs of stormwater management devices, detect leaks and ensure the good condition of containers, evaluate the performance of the existing stormwater BMPs described in the SWPPP, and document any deficiencies in the implementation and/or adequacy of the SWPPP.⁴⁸ Such deficiencies must then be addressed through corrective actions.

The General Permit requires that all covered facilities conduct multiple types of analytical monitoring, and DEC may require additional individualized monitoring as well.⁴⁹ In particular, all facilities authorized under the General Permit must:

- collect and analyze stormwater samples for each outfall at least annually;⁵⁰
- conduct visual monitoring of stormwater discharges at least quarterly;⁵¹
- perform an annual dry weather inspection to detect non-stormwater discharges;⁵²
- inspect, sample and monitor discharges from coal pile runoff;⁵³
- inspect, sample and monitor discharges from secondary containment structures and transfer areas;⁵⁴
- document storm events during which any samples are taken;⁵⁵
- document all of these monitoring activities;⁵⁶

⁴⁴ See General Permit, Part IV.A.1.

⁴⁵ See General Permit, Part IV.A.1.

⁴⁶ See General Permit, Part IV.A.2.

⁴⁷ See General Permit, Part III.C.7.b.2.

⁴⁸ See General Permit, Part III.C.7.b.1 and b.3.

⁴⁹ See General Permit, Part IV.B.3.

⁵⁰ See General Permit, Part IV.B.1.c (requiring at least annual collection and analysis of stormwater samples). See General Permit, Part IV.B.1.d, .e, .f, and .g for obligations to sample more frequently.

⁵¹ See General Permit, Part IV.B.1.a.

⁵² See General Permit, Part IV.B.1.b.

⁵³ See General Permit, Part IV.B.1.d.

⁵⁴ See General Permit, Part IV.B.1.f.

⁵⁵ See General Permit, Part IV.B.2.c.

⁵⁶ See, e.g., General Permit, Parts IV.B.1.a.8, IV.B.1.b.4, IV.B.1.c.9, *see generally* Part IV.E.

- keep records of the monitoring with the Facility's SWPPP;⁵⁷ and
- submit an annual report to DEC accompanied by a Discharge Monitoring Report detailing the results of all required stormwater samples, as well as reports that documents any instance of non-compliance with benchmarks or numeric effluent limitations.⁵⁸

Because MV Transportation engages in industrial activities associated under Sector P, sampling is required for:

- Oil & Grease;
- Chemical Oxygen Demand;
- Benzene;
- Ethylbenzene;
- Toluene; and
- Xylene.⁵⁹

The Waterkeepers are not necessarily aware of all industrial activities taking place at the Facilities. To the extent that industrial activities other than the above are carried out at the Facilities, other sampling may be required as well.⁶⁰ This notice provides MV Transportation with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

MV Transportation has failed at both Facilities to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VIII of the General Permit. MV Transportation also has failed to retain records and submit monitoring reports to DEC pertaining to both Facilities, as required by, at least, Parts IV and VIII of the General Permit.

4. MV Transportation has failed at both Facilities to comply with additional requirements located in Part VIII of the General Permit.

As noted above, the General Permit contains various requirements specific to Sector P. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:

- A requirement to describe and assess in MV Transportation's SWPPP the potential for the following to contribute pollutants to stormwater discharges:
 - On-site waste storage or disposal;
 - Dirt/gravel parking areas for vehicles awaiting maintenance; and,

⁵⁷ See General Permit, Part IV.E.

⁵⁸ See General Permit, Part IV.B.1 and 2 and Part IV.C.

⁵⁹ See General Permit, Part VIII, Sector P.

⁶⁰ See General Permit, Part VIII.

- Fueling areas.
- A requirement that the following areas/activities be included in all inspections:
 - Storage area for vehicles /equipment awaiting maintenance;
 - Fueling areas;
 - Indoor and outdoor vehicle/equipment maintenance areas;
 - Material storage areas;
 - Vehicle/equipment cleaning areas; and
 - Loading/unloading areas.
- A requirement that employee training take place, at a minimum, annually (once per calendar year) and address the following, as applicable:
 - Used oil and spent solvent management;
 - Fueling procedures;
 - General good housekeeping practices;
 - Proper painting procedures; and
 - Used battery management.
- A requirement that storage of vehicles and equipment awaiting maintenance with actual or potential fluid leaks be confined to designated areas (delineated on the site map). The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - The use of drip pans under vehicles and equipment;
 - Indoor storage of vehicles and equipment;
 - Installation of berms or dikes;
 - Use of absorbents;
 - Roofing or covering storage areas; and
 - Cleaning pavement surface to remove oil and grease.
- A requirement that storage vessels of all materials (e.g., for used oil/oil filters, spent solvents, paint wastes, hydraulic fluids) are maintained in good condition, so as to prevent contamination of stormwater, and plainly labelled (e.g., "used oil," "spent solvents," etc.). The SWPPP shall document considerations of the following storage-related BMPs (or their equivalents):
 - Indoor storage of the materials;
 - Installation of berms/dikes around the areas, minimizing runoff of stormwater to the areas;
 - Using dry cleanup methods; and
 - Treating and/or recycling the collected stormwater runoff.

- A requirement that the SWPPP describe and provide for implementation of measures that prevent or minimize contamination of stormwater runoff from all areas used for vehicle/equipment cleaning. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Performing all cleaning operations indoors;
 - Covering the cleaning operation;
 - Ensuring that all wash waters drain to a proper collection system (i.e., not the stormwater drainage system unless SPDES permitted); and,
 - Treating and/or recycling the collected stormwater runoff.
- A requirement that the SWPPP describe and provide for implementation of measures that prevent or minimize contamination of the stormwater runoff from all areas used for vehicle/equipment maintenance. The SWPPP shall document consideration of the following BMPs (or their equivalents):
 - Performing maintenance activities indoors; using drip pans;
 - Keeping an organized inventory of materials used in the shop;
 - Draining all parts of fluids prior to disposal;
 - Prohibiting wet clean up practices where the practices would result in the discharge of pollutants to stormwater drainage systems;
 - Using dry cleanup methods;
 - Treating and/or recycling collected stormwater runoff; and
 - Minimizing runoff of stormwater to maintenance areas.⁶¹

MV Transportation's activities at both Facilities are included in the definition of industrial activity to which the CWA applies. Therefore, MV Transportation must obtain coverage under and comply with the requirements of the General Permit, including those specific to MV Transportation's industrial activities, as described in Part VIII and outlined above. MV Transportation has failed to obtain coverage for both Facilities under the General Permit and comply with these additional requirements.

5. MV Transportation is Discharging a Pollutant of Concern to Impaired Waters

Discharges to an impaired waterbody listed on New York's 303(d) list are not eligible for coverage under the General Permit if the cause of impairment is a pollutant of concern included in the benchmarks and/or effluent limitations to which the facility is subject unless the facility:

- Prevents all exposure to stormwater of the pollutant(s) for which the waterbody is impaired,
- Documents that the pollutant for which the waterbody is impaired is not present onsite, or

⁶¹ See General Permit, Part VIII, Sector P.

- Provides additional information in the SWPPP to minimize the pollutant of concern causing the impairment as specified in Part III.F.4.⁶²

The Kill Van Kull is an impaired waterbody listed on New York's 303(d) list. Its impairment is caused by PCBs, other toxics, and floatables.⁶³ Benzene, toluene, Ethylbenzene, and xylene (together "BTEX") are toxics included in the benchmarks monitoring requirements to which the Staten Island Facility is subject. MV Transportation has not prevented all exposure of BTEX. MV Transportation has not documented that BTEX are not present onsite. MV Transportation has not submitted a SWPPP with the additional information specified in Part III.F.4 of the General Permit.

In addition, because the Kill van Kull is impaired by pollutants of concern included in the benchmarks and/or effluent limitations to which the Staten Island Facility is subject, MV Transportation is required to collect and analyze stormwater samples for each outfall for the impairing pollutants quarterly.⁶⁴ MV Transportation has failed to comply with this requirement.

6. MV Transportation is Clearly Violating the Clean Water Act at Both Facilities.

In sum, MV Transportation's discharge of stormwater associated with industrial activities without a permit, MV Transportation's failure to apply for permit coverage, and MV Transportation's failure to comply with the above-listed conditions of the General Permit (or an individual NPDES permit) at both Facilities constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

III.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

MV Transportation of California, MV Transportation, Inc., and Reliant Transportation, Inc. are the persons (as defined by Section 502(5) of the CWA) responsible for the violations alleged in this Notice. The Waterkeepers believe that MV Transportation has operated both Facilities since at least 2010.⁶⁵ MV Transportation has operational control over the day-to-day industrial activities at both Facilities. Therefore, MV Transportation is responsible for managing stormwater at the Facilities in compliance with the CWA. The Waterkeepers hereby put MV Transportation on notice that if they subsequently identify additional persons as also being responsible for the violations set forth above, the Waterkeepers intend to include those persons in this action.

⁶² See General Permit Part II.C.1.

⁶³ 303(d) List at 9 & 25.

⁶⁴ See General Permit, Part IV.B.1.g.

⁶⁵ MV Transportation of California registered with the New York State Department of State to conduct business in New York in 2001.

IV.

LOCATION OF THE ALLEGED VIOLATION

The Brooklyn Facility. The violations alleged in this Notice have occurred and continue to occur at the Brooklyn Facility located at 297 Norman Avenue, Brooklyn, New York. For clarity, the Facility location can be uniquely identified as block 2612, lot 133 in Kings County. Stormwater flows from the Facility into a separate sewer system that discharges directly into Newtown Creek. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Brooklyn Facility in general and in the inadequate documents themselves.⁶⁶

The Staten Island Facility. The violations alleged in this Notice have occurred and continue to occur at the Staten Island Facility located at 1957 Richmond Terrace, Staten Island, New York. For clarity, the Facility location can be uniquely identified as block 185, lot 527 in Richmond County. Stormwater runs directly off the Facility overland and through storm drains into the Kill Van Kull via a short inlet. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Staten Island Facility in general and in the inadequate documents themselves.⁶⁷

V.

DATES OF VIOLATION

Every day upon which MV Transportation has failed to apply for permit coverage since MV Transportation first commenced operations at the two Facilities and discharged polluted stormwater are two separate violation of Sections 301(a) of the CWA and EPA's regulations implementing the CWA.⁶⁸ These days of violation have continued consecutively since at least 2010, by which time the Waterkeepers believe MV Transportation was operating both Facilities.

⁶⁶ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. *See, e.g., Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), *aff'd* 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 439 (D. Md. 2010); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995).

⁶⁷ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. *See, e.g., Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), *aff'd* 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 439 (D. Md. 2010); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995).

⁶⁸ *See* 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

Additionally, MV Transportation has discharged from both Facilities without a permit in violation of Section 301(a) of the CWA on every day since MV Transportation commenced operations at the Facilities on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

Finally, if MV Transportation seeks permit coverage for the Facilities after receiving this letter but fails to fully comply with the requirements of the General Permit (or an individual permit), each day upon which MV Transportation claims coverage under a NPDES permit but fails to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

MV Transportation is liable for the above-described violations occurring prior to the date of this letter and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available after the date of this Notice of Intent to File Suit.⁶⁹ These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

VI.

RELIEF REQUESTED

The Waterkeepers will ask the court to order MV Transportation to comply with the Clean Water Act, to pay penalties, and to pay the Waterkeepers' costs and legal fees.

First, the Waterkeepers will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), and such other relief as permitted by law. The Waterkeepers will seek an order from the Court requiring MV Transportation to obtain NPDES permit coverage at both Facilities and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Second, pursuant to Section 309(d) of the CWA,⁷⁰ each separate violation of the CWA subjects MV Transportation to a penalty not to exceed \$32,500 per day for each violation which occurred between March 15, 2004 and January 12, 2009, and up to \$37,500 per day for each violation that occurred after January 12, 2009.⁷¹ The Waterkeepers will seek the full penalties allowed by law.

⁶⁹ See, e.g. *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.").

⁷⁰ 33 U.S.C. § 1319(d); see also 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

⁷¹ 40 C.F.R. § 19.2.

Third and lastly, pursuant to Section 505(d) of the CWA, The Waterkeepers will seek recovery of litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
(914) 478-4501
Attn.: John Parker

Raritan Baykeeper, Inc.
d/b/a NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735
732-888-9870
Attn.: Debbie Mans, Executive Director

VIII.

IDENTIFICATION OF COUNSEL

The Waterkeepers are represented by legal counsel in this matter. The name, address, and telephone number of the Waterkeepers' attorneys are:

Reed W. Super
Edan Rotenberg
Nicholas W. Tapert
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038
(212) 242-2355

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit MV Transportation to identify the specific standard, limitation, or order alleged to have been violated, the activities alleged to constitute violations, the person or persons responsible for the alleged violations, the locations of the alleged violation, the date or dates of such violations, and the full name, address, and telephone number of the person giving notice.⁷²

If MV Transportation has developed a SWPPP for one or both Facilities, the Waterkeepers request that MV Transportation send a copy to the undersigned attorney.⁷³ Otherwise, the Waterkeepers encourage MV Transportation to begin developing SWPPPs immediately after receiving this letter and ask that MV Transportation please inform the undersigned attorney of MV Transportation's efforts so the Waterkeepers can work with MV Transportation to avoid disputes over the contents of the SWPPPs.⁷⁴

⁷² 40 C.F.R. § 135.3(a).

⁷³ Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

⁷⁴ The Waterkeepers will not send a new notice letter in response to any effort MV Transportation makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). See also *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

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During the sixty-day notice period, the Waterkeepers are willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If MV Transportation wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the sixty days.

Very truly yours,



Edan Rotenberg
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cc:

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Judith A. Enck, EPA Region 2 Administrator
Environmental Protection Agency
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